violation of §1 of the Sherman Act. 466 U. S., at 5. Like the product at issue in the *Fortner* cases, the tying product in *Jefferson Parish*—hospital services—was unpatented, and our holding again rested on the conclusion that the plaintiff had failed to prove sufficient power in the tying product market to restrain competition in the market for the tied product—services of anesthesiologists. 466 U. S., at 28–29.

In rejecting the application of a *per se* rule that all tying arrangements constitute antitrust violations, we explained:

> "[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market. . . .
>
> . . . . .
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> "*Per se* condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. . . .
>
> "For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. *United States* v. *Loew's Inc.*, 371 U. S., at 45–47. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful." *Id.*, at 13–16 (footnote omitted).

Notably, nothing in our opinion suggested a rebuttable presumption of market power applicable to tying ar-

competition with its sale of an unpatented article." *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 490 (1942); see also, *e.g.*, *Carbice Corp. of America* v. *American Patents Development Corp.*, 283 U. S. 27, 31 (1931).

Without any analysis of actual market conditions, these patent misuse decisions assumed that, by tying the purchase of unpatented goods to the sale of the patented good, the patentee was "restraining competition," *Morton Salt*, 314 U. S., at 490, or "secur[ing] a limited monopoly of an unpatented material," *Mercoid*, 320 U. S., at 664; see also *Carbice*, 283 U. S., at 31–32. In other words, these decisions presumed "[t]he requisite economic power" over the tying product such that the patentee could "extend [its] economic control to unpatented products." *Loew's*, 371 U. S., at 45–46.

The presumption that a patent confers market power migrated from patent law to antitrust law in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947). In that case, we affirmed a District Court decision holding that leases of patented machines requiring the lessees to use the defendant's unpatented salt products violated §1 of the Sherman Act and §3 of the Clayton Act as a matter of law. *Id.*, at 396. Although the Court's opinion does not discuss market power or the patent misuse doctrine, it assumes that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *Ibid.*

The assumption that tying contracts "ten[d] . . . to accomplishment of monopoly" can be traced to the Government's brief in *International Salt*, which relied heavily on our earlier patent misuse decision in *Morton Salt*. The Government described *Morton Salt* as "present[ing] a factual situation almost identical with the instant case," and it asserted that "although the Court in that case did not find it necessary to decide whether the antitrust laws

were violated, its language, its reasoning, and its citations indicate that the policy underlying the decision was the same as that of the Sherman Act." Brief for United States in *International Salt Co.* v. *United States*, O. T. 1947, No. 46, p. 19 (United States Brief). Building on its assertion that *International Salt* was logically indistinguishable from *Morton Salt*, the Government argued that this Court should place tying arrangements involving patented products in the category of *per se* violations of the Sherman Act. United States Brief 26–33.

Our opinion in *International Salt* clearly shows that we accepted the Government's invitation to import the presumption of market power in a patented product into our antitrust jurisprudence. While we cited *Morton Salt* only for the narrower proposition that the defendant's patents did not confer any right to restrain competition in unpatented salt or afford the defendant any immunity from the antitrust laws, *International Salt*, 332 U. S., at 395–396, given the fact that the defendant was selling its unpatented salt at competitive prices, *id.*, at 396–397, the rule adopted in *International Salt* necessarily accepted the Government's submission that the earlier patent misuse cases supported the broader proposition "that this type of restraint is unlawful on its face under the Sherman Act," United States Brief 12.

Indeed, later in the same Term we cited *International Salt* for the proposition that the license of "a patented device on condition that unpatented materials be employed in conjunction with the patented device" is an example of a restraint that is "illegal *per se*." *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522–523, and n. 22 (1948). And in subsequent cases we have repeatedly grounded the presumption of market power over a patented device in *International Salt*. See, *e.g.*, *Loew's*, 371 U. S., at 45–46; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 608 (1953); *Standard Oil Co.*, 337 U. S., at 304.

IV

Although the patent misuse doctrine and our antitrust jurisprudence became intertwined in *International Salt*, subsequent events initiated their untwining. This process has ultimately led to today's reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product, the first case since 1947 in which we have granted review to consider the presumption's continuing validity.

Three years before we decided *International Salt*, this Court had expanded the scope of the patent misuse doctrine to include not only supplies or materials used by a patented device, but also tying arrangements involving a combination patent and "unpatented material or [a] device [that] is itself an integral part of the structure embodying the patent." *Mercoid*, 320 U. S., at 665; see also *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 188–198 (1980) (describing in detail *Mercoid* and the cases leading up to it). In reaching this conclusion, the Court explained that it could see "no difference in principle" between cases involving elements essential to the inventive character of the patent and elements peripheral to it; both, in the Court's view, were attempts to "expan[d] the patent beyond the legitimate scope of its monopoly." *Mercoid*, 320 U. S., at 665.

Shortly thereafter, Congress codified the patent laws for the first time. See 66 Stat. 792, codified as 35 U. S. C. §1 *et seq.* (2000 ed. and Supp. III). At least partly in response to our *Mercoid* decision, Congress included a provision in its codification that excluded some conduct, such as a tying arrangement involving the sale of a patented product tied to an "essential" or "nonstaple" product that has no use except as part of the patented product or method, from the scope of the patent misuse doctrine. §271(d); see also *Dawson*, 448 U. S., at 214. Thus, at the same time that our antitrust jurisprudence continued to rely on the

assumption that "tying arrangements generally serve no legitimate business purpose," *Fortner I*, 394 U. S., at 503, Congress began chipping away at the assumption in the patent misuse context from whence it came.

It is Congress' most recent narrowing of the patent misuse defense, however, that is directly relevant to this case. Four years after our decision in *Jefferson Parish* repeated the patent–equals–market–power presumption, 466 U. S., at 16, Congress amended the Patent Code to eliminate that presumption in the patent misuse context, 102 Stat. 4674. The relevant provision reads:

> "(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, *unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.*" 35 U. S. C. §271(d)(5) (emphasis added).

The italicized clause makes it clear that Congress did not intend the mere existence of a patent to constitute the requisite "market power." Indeed, fairly read, it provides that without proof that Trident had market power in the relevant market, its conduct at issue in this case was neither "misuse" nor an "illegal extension of the patent right."

While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the *per se* rule announced in *International Salt*.[3] A rule deny-

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[3] While our opinions have made clear that such an invitation is not

ing a patentee the right to enjoin an infringer is significantly less severe than a rule that makes the conduct at issue a federal crime punishable by up to 10 years in prison. See 15 U. S. C. §1. It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute "misuse." Moreover, given the fact that the patent misuse doctrine provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation. Cf. 10 P. Areeda, H. Hovenkamp, & E. Elhauge, Antitrust Law ¶1737c (2d ed. 2004) (hereinafter Areeda).

After considering the congressional judgment reflected in the 1988 amendment, we conclude that tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's*. While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy, see, *e.g.*, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 145–146 (1948), that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.[4]

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necessary with respect to cases arising under the Sherman Act, see *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997), it is certainly sufficient to warrant reevaluation of our precedent, *id.*, at 21 ("[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question").

[4]Our imposition of this requirement accords with the vast majority of academic literature on the subject. See, *e.g.*, 10 Areeda ¶1737a ("[T]here is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent"); Burchfiel, Patent Misuse and Antitrust Reform: "Blessed be the Tie?" 4 Harv. J. L. & Tech. 1, 57, and n. 340 (noting that the market power presumption has been extensively criticized and citing sources); 1 H. Hovenkamp, M.

V

Rather than arguing that we should retain the rule of *per se* illegality, respondent contends that we should endorse a rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee. Cf. *supra*, at 7–8. Respondent recognizes that a large number of valid patents have little, if any, commercial significance, but submits that those that are used to impose tying arrangements on unwilling purchasers likely do exert significant market power. Hence, in respondent's view, the presumption would have no impact on patents of only slight value and would be justified, subject to being rebutted by evidence offered by the patentee, in cases in which the patent has sufficient value to enable the patentee to insist on acceptance of the tie.

Respondent also offers a narrower alternative, suggesting that we differentiate between tying arrangements involving the simultaneous purchase of two products that are arguably two components of a single product—such as the provision of surgical services and anesthesiology in the same operation, *Jefferson Parish*, 466 U. S., at 43 (O'Connor, J., concurring in judgment), or the licensing of one copyrighted film on condition that the licensee take a package of several films in the same transaction, *Loew's*, 371 U. S. 38—and a tying arrangement involving the purchase of unpatented goods over a period of time, a so-called "requirements tie." See also Brief for Barry Nalebuff et al. as *Amici Curiae*. According to respondent, we should recognize a presumption of market power when

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Janis, & M. Lemley, IP and Antitrust §4.2a (2005 Supp.) ("[C]overage of one's product with an intellectual property right does not confer a monopoly"); W. Landes & R. Posner, The Economic Structure of Intellectual Property Law 374 (2003) (hereinafter Landes & Posner).

faced with the latter type of arrangements because they provide a means for charging large volume purchasers a higher royalty for use of the patent than small purchasers must pay, a form of discrimination that "is strong evidence of market power." Brief for Respondent 27; see generally *Jefferson Parish*, 466 U. S., at 15, n. 23 (discussing price discrimination of this sort and citing sources).

The opinion that imported the "patent equals market power" presumption into our antitrust jurisprudence, however, provides no support for respondent's proposed alternative. In *International Salt*, it was the existence of the patent on the tying product, rather than the use of a requirements tie, that led the Court to presume market power. 332 U. S., at 395 ("The appellant's patents confer a limited monopoly of the invention they reward"). Moreover, the requirements tie in that case did not involve any price discrimination between large volume and small volume purchasers or evidence of noncompetitive pricing. Instead, the leases at issue provided that if any competitor offered salt, the tied product, at a lower price, "the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price." *Id.*, at 396.

As we have already noted, the vast majority of academic literature recognizes that a patent does not necessarily confer market power. See n. 4, *supra*. Similarly, while price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package, see, *e.g.*, 10 Areeda ¶1769c, it is generally recognized that it also occurs in fully competitive markets, see, *e.g.*, Baumol & Swanson, The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power, 70 Antitrust L. J. 661, 666 (2003); 9 Areeda ¶1711; Landes & Posner 374–375. We are not persuaded that the combination of these two factors should give rise to a presumption of market power

when neither is sufficient to do so standing alone. Rather, the lesson to be learned from *International Salt* and the academic commentary is the same: Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market. For this reason, we reject both respondent's proposed rebuttable presumption and their narrower alternative.

It is no doubt the virtual consensus among economists that has persuaded the enforcement agencies to reject the position that the Government took when it supported the *per se* rule that the Court adopted in the 1940's. See *supra*, at 8. In antitrust guidelines issued jointly by the Department of Justice and the Federal Trade Commission in 1995, the enforcement agencies stated that in the exercise of their prosecutorial discretion they "will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." U. S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property §2.2 (Apr. 6, 1995), available at http://www.usdoj.gov/atr/public/guidelines/0558.pdf (as visited Feb. 24, 2006, and available in Clerk of Court's case file). While that choice is not binding on the Court, it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.

Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

VI

In this case, respondent reasonably relied on our prior opinions in moving for summary judgment without offer-

ing evidence defining the relevant market or proving that petitioners possess power within it. When the case returns to the District Court, respondent should therefore be given a fair opportunity to develop and introduce evidence on that issue, as well as any other issues that are relevant to its remaining §1 claims. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.